

Bills Committee on Town Planning (Amendment) Bill 2003

Liability of Managers of Clans, Families or T'ongs for Offences in relation to Unauthorized Developments under the Town Planning Ordinance

Background

In the Town Planning (Amendment) Bill 2003, we propose to introduce a legislative amendment to include an express provision in the Town Planning Ordinance that managers of a clan, family or t'ong (hereafter also generally referred to as "tso/t'ong") shall be regarded as land owners who are liable to offences in relation to unauthorized developments. The proposed amendment aims to clarify the existing legal position, as confirmed in the Court of Appeal case of *Attorney General v Lam Mei Chai [1997] 1 HKG22* (details set out in LC Paper No. CB(1) 2520/02-03 (02)) so as to avoid future misconceptions or disputes over the responsibilities of "tso/t'ong" managers in so far as planning enforcement is concerned.

2. We have received strong objections from many New Territories (NT) organizations, including the Heung Yee Kuk, rural committees and over 100 "tsos/t'ongs"¹, in respect of the proposal. The objections of HYK and the NT organizations relate to the rights and obligations of the "tso/t'ong" managers vis-à-vis the "tso/t'ong" and the practical difficulties and limitations that "tso/t'ong" managers are facing in executing their duties. The main concern is that judging from the actual operation of a "tso/t'ong", tso/t'ong managers only act as an agent, and their powers are restricted. Other concerns are that -

- Land held by "tso/t'ong" is, in many cases, scattered and plenty. A manager has practical difficulty in inspecting all the land held by the "tso/t'ong". In fact, many "tsos/t'ongs" do not even have a clear idea of the boundaries of land held by the "tso/t'ong"; and that

¹ At present, there are about 7,300 "tsos/t'ongs" and 13,000 "tso/t'ong" managers. According to the Heung Yee Kuk, many of them may resign because of the proposal. The resignation en masse of the "tso/t'ong" managers may result in confusion and chaos in the management of land in the New Territories

- notwithstanding section 15 of the New Territories Ordinance, the powers of “tso/t’ong” managers are in practice much more limited. Decisions affecting the interests of the land, such as the rents collected, land use and covenants made, are in practice expected to rest with the members of “tso/t’ong” holding the land rather than the manager concerned. In other words, a manager does not in practice have full control over the land held by his “tso/t’ong”. Besides, under the New Territories Ordinance, the Secretary for Home Affairs may on good cause replace the appointment of any manager upon request.

Latest developments

3. Having looked into the actual operation of the “tso/t’ong”, we note many of the concerns raised by the NT organizations. In our recent discussions with the Heung Yee Kuk, the Kuk opined that any enforcement action should be directed at the “tsos/t’ongs” instead of the managers. They suggested that the Government should consider changing the legal status of “tsos/t’ongs” or requiring incorporation of “tsos/t’ongs” so that for statutory provisions imposing liability on such corporations, they can be subject to prosecution, as in the case of an “owners’ corporations” under the Building Management Ordinance. (The existing legal status of “tso/t’ong” and the rights and responsibilities of its managers are set out in Annex 1.) This suggestion represents a fundamental change to the role of “tso/t’ong” and the rights and obligations of “tso/t’ong” managers, and is outside the scope of the Town Planning Ordinance. The practicality of the proposal is also subject to further careful examination in the context of the New Territories Ordinance.

4. In the light of the above, we acknowledge that more time is needed to address the concerns through explanation or a fundamental review. In order not to delay the passage of the Bill, we therefore propose to withdraw the proposed amendment to the definition of “land owner” in the Town Planning Ordinance, until after the Administration has an opportunity to fully examine the more complex issues concerning the status of “tso/t’ong” and the rights and obligations of its managers.

5. We assure Members that the proposed withdrawal, however, will not affect the enforcement actions to be taken by Director of Planning against unauthorized developments. In other words, Director of Planning will continue with its existing practice in dealing with unauthorized development cases involving land held by “tso/t’ong”, in accordance with the ruling in the *Lam Mei Chai* case. A note setting out the enforcement actions taken by Director of Planning against unauthorized developments concerning “tso/t’ong” managers and the relevant prosecution statistics are at Annex 2.

Advice Sought

6. Subject to the views of Members of the Bills Committee, we shall proceed to draft a Committee Stage Amendment to withdraw the proposed amendment to the definition of “land owner” from the Bill.

Housing, Planning and Lands Bureau
Planning Department
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**Legal Status of “tso/t’ong” and
the Rights and Responsibilities of Its Manager**

The entity “tso/t’ong” is a kind of customary Chinese institution and an unincorporated body. Under common law, an unincorporated body is not a legal person and therefore could not incur any criminal liability. If it commits a criminal offence, all its members should theoretically be summoned to appear as the party to answer the charge. In the case of “tso/t’ong”, this is considered impractical because not every “tso/t’ong” has a detailed and updated record of its members, and “tso/t’ong” is also not required under any statute to keep such records.

2. Where a “tso/t’ong” holds land from the Government (whether under lease, or other grant, agreement or licence), section 15 of the New Territories Ordinance requires the appointment of a manager to represent it. Every such appointment should be reported at the appropriate New Territories District Office of the Home Affairs Department. Section 15 of the New Territories Ordinance also specifies the following rights and responsibilities of a “tso/t’ong” manager:

- (a) he shall have full power to dispose of or in any way deal with the land held by the “tso/t’ong” as if he were the sole owner thereof, subject to the consent of the Secretary for Home Affairs;
- (b) he shall be personally liable for the payment of all rents and charges, and for the observance of all covenants and conditions in respect of the land held by the “tso/t’ong”; and
- (c) every instrument in relation to the land held by the “tso/t’ong” which is executed or signed by him in the presence of and attested by the Secretary for Home Affairs be as effectual for all purposes as if it had been executed or signed by all the “tso/t’ong” members.

Existing enforcement procedures against unauthorized developments concerning “tso/t’ong” land

Enforcement procedures

Under the existing enforcement procedure, Director of Planning is empowered to take direct prosecution action under section 20(7) or 21(1) of the Town Planning Ordinance against any person who undertakes or continues an unauthorized development. If such person is not the “tso/t’ong” itself, its manager will not be directly prosecuted under such section. So far, no direct prosecution action has been instigated against a person in the capacity as “tso/t’ong” manager for undertaking or continuing an unauthorized development. Instead, prosecution action has only been taken against “tso/t’ong” managers for non-compliance of statutory notices in their capacity as land owner of the “tso/t’ong” land under section 23(6) of the Ordinance.

2. If any unauthorized development concerns the land of a “tso/t’ong”, section 23 of the Town Planning Ordinance will be invoked. Director of Planning will, through a non-statutory warning letter and a statutory enforcement notice, give a reasonable period of time (usually a 3-month period is specified in the statutory notice) to the “tso/t’ong” manager for him to discontinue the unauthorized development on the “tso/t’ong” land.

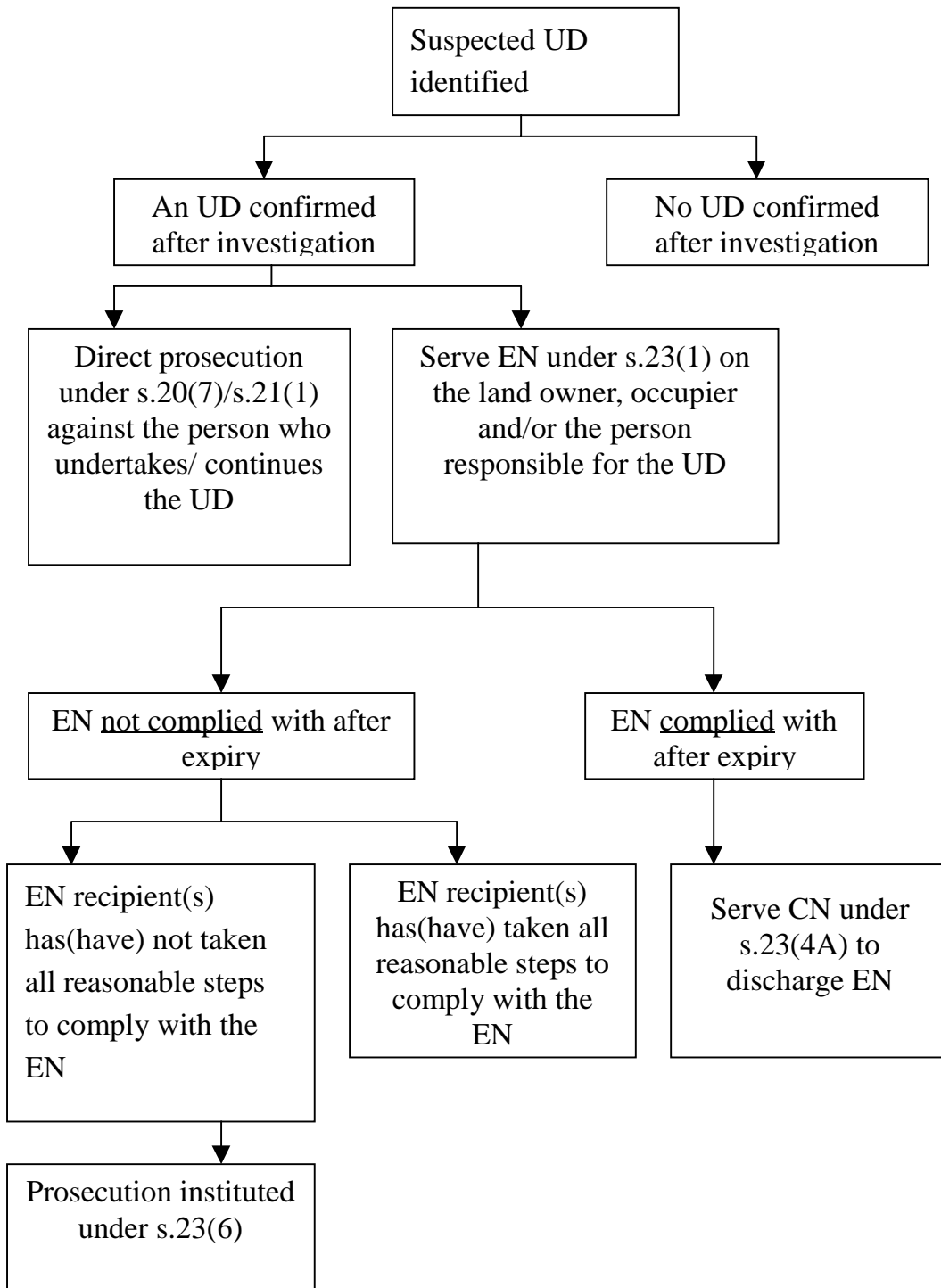
3. Prosecution action against the “tso/t’ong” manager will be taken if he fails to take all the reasonable steps to comply with the requirements of the statutory notice on or before the specified date. Depending on the evidence and the circumstances of each case, the reasonable steps may include the termination of any concerned tenancy, the issue of a letter to any illegal occupier requiring clearance of the land, and the report to the police relating to any illegal occupation of the land by some unknown person. A flowchart showing the above enforcement procedures is attached.

Prosecution statistics

4. Since the introduction of planning control to the New Territories in

1991, Director of Planning has initiated prosecution against a total of 330 unauthorized development cases, of which 37 cases involve “tso/t’ong”. In all these cases, the “tso/t’ong” managers are not the operators of the unauthorized developments. Out of these 37 cases, there were conviction in 32 cases (involving 41 “tso/t’ongs”). The overall prosecution cases involving “tso/t’ong” is about 11%.

Existing enforcement procedures against unauthorized developments under the Town Planning Ordinance



- Notes**
- UD : unauthorized development
 - EN : enforcement notice (usually, a three-month period will be given to the recipient to comply with the notice)
 - CN : compliance notice